INDEX

PAGE

Opinions Below 2

Questions Involved 3

Statement 3

Argument:

POINT I—The judgment below conforms to the rules cited by petitioner and is not contrary to, nor inconsistent with, those rules 7

POINT II—The judgment below is in conformity with the decisions of this Court and the lower courts, and there is no inconsistency 9

Conclusion 15

TABLE OF CASES

Barbazon v. Bellships Co., 202 F. 2d 904 14

Berti v. Compagnie de Navigation Cyprien Fabre, 213 F. 2d 397 13

Filipek v. Moore-McCormack Lines, 258 F. 2d 734 .. 11

Freitas v. Pacific-Atlantic Steamship Co., 218 F. 2d 562 14

Gallagher v. United States Lines Co., 206 F. 2d 177 .. 12

Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 625, 79 S. Ct. 406 14

Latus v. United States, 170 F. Supp. 837 14

PAGE

Long v. Silver Line, 48 F. 2d 15 13

Lopez v. American Hawaiian Steamship Co., 201 F. 2d 418 14

Lyon v. United States, 163 F. Supp. 206, aff'd 265 F. 2d 219 14

Pedersen v. The Bulklube, 170 F. Supp. 462 14

Phipps v. N. V. Nederlandsche Amerikaansche, S. M. 259 F. 2d 143 14

United N. Y. & N. J. Sandy Hook Pilots' Ass'n v. Halecki, 358 U. S. 613, 79 S. Ct. 517 .....11, 12

West v. United States, 361 U. S. 118, 80 S. Ct. 189 .. 9, 10

F. R. of C. P. References:

Rule 49 ..... 3, 8

Rule 51 ..... 3, 7

Rule 58 ..... 3, 8

Supreme Court of the United States

BEATRICE LYONS, temporary administratrix, with limited authority of the goods, chattels and credits of JOHN LYONS, deceased,

Petitioner,

against

UNITED FRUIT COMPANY, AGENCIA MARITIMA HONDURENA, S.A., and EMPRESSA HONDURENA de VAPORES, S.A.,

Respondents,

and

AGENCIA MARITIMA HONDURENA, S.A., and EMPRESSA HONDURENA de VAPORES, S.A.,

Third-Party Plaintiffs,

against

BETHLEHEM STEEL COMPANY,

Third-Party Defendant.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

The petition for certiorari herein seeks a review by this Court of a judgment entered in the United States District Court for the Southern District of New York on a special verdict of a jury, which judgment was affirmed by the Court of Appeals for the Second Circuit. Although the complaint was dismissed as against defendants United Fruit Company and Agencia Maritima Hondurena, S. A.,

(Petition, p. 4), their names are continued in the caption of the petition; and, for conformity, we have used the same caption. In fact, however, the only parties now in the litigation are the petitioner (plaintiff), respondent Empressa Hondurena de Vapores (defendant) and respondent Bethlehem Steel Company (third-party defendant).

Believing the judgment and decisions were correct, the defendant and the third-party defendant in the trial court join in this brief in opposition to certiorari. They both submit that there is no constitutional or legal question involved, and no conflict in decisions warranting further review by this Court. The petitioner's argument appears to be that the jury was wrong, and if her attorneys amend the verdict in her favor, the judgment should be reversed. We do not know of any case in which this Court has allowed attorneys to amend a jury's verdict in order to support a different, more favorable judgment.

The complaint originally claimed unseaworthiness of the ship, the S/S "Choloma," and negligence of her owner; but the plaintiff withdrew the claim of unseaworthiness (53a, Petition, p. 25) and the trial proceeded on the issue of negligence of the shipowner.

Opinions Below

The opinion of the trial court is reported in 170 F. Supp. 261, with an appendix setting out the questions submitted to the jury for its special verdict and the jury's answers (170 F. Supp. at p. 266).

The opinion of the Court of Appeals is reported in 273 F. 2d 317, and is also set out in the appendix to the petition for certiorari.

Questions Involved

The petitioner states that the questions presented by the petition (pp. 2-3) are with respect to the authority of the trial court to grant judgment on the special verdict of the jury, notwithstanding Rules 51, 58 and 49 of the Federal Rules of Civil Procedure.

It is our opinion that the only question involved is whether a trial court or an appellate court should change, or disregard, a jury verdict properly based on the evidence in the case, and grant judgment contrary to such verdict. Certainly that is not required by any of the rules on which petitioner professes to rely.

Statement

Briefly, the facts involved in this case are stated in the opinion of the District Court (170 F. Supp. 261) and the opinion of the Court of Appeals (273 F. 2d 317). Except in one minor respect we agree with the following statement in the District Court's opinion:

> "This action was brought by plaintiff to recover for personal injuries he sustained while working aboard defendant's vessel, the S/S 'Choloma,' as an employee of Bethlehem Steel Company, the third party defendant. On December 11, 1956, the day of the accident, the ship was tied up at Bethlehem's Hoboken, New Jersey shipyard for repairs. Plaintiff, an iron worker, was assigned to work in the port wing of the ship's large molasses tank. In order to leave the port wing, plaintiff had to pass over or near a large opening of the tank in the tween deck. The accident occurred when plaintiff slipped into this opening and fell 10-15 feet to the floor of the tank, sustaining injuries.
>
> • • • •

"Although plaintiff originally also sought to recover under the doctrine of unseaworthiness, this theory was not pressed and was abandoned by plaintiff at the trial.

"Defendant Empressa impleaded the Bethlehem Steel Company, the plaintiff's employer, claiming the right to indemnity arising out of the agreement to repair the involved portion of the ship" p. 262.

The statement in that opinion that is not wholly accurate is that the plaintiff "slipped." There is no evidence that he slipped into the opening, but his own testimony was that he stepped into it (7a, 10a, 57a, 58a, 59a).

The facts were stated by the Court of Appeals as follows:

"Plaintiff, an iron worker in the employ of Bethlehem Steel Company brought this action for damages for personal injuries sustained in a fall aboard defendant's vessel, the S/S Choloma. * * * At the time of the injury the vessel was at Bethlehem's shipyard in Hoboken, New Jersey, in order to have a number of deck beams renewed. The location where these repairs were to be effected could be reached only by crossing an open molasses tank in the vessel's 'tween deck. In order to afford its employees a means of ingress and egress, Bethlehem placed a 12 inch plank across this opening and it also installed temporary electric lights to illuminate the area. These lights were connected by cable to Bethlehem's shore current.

"On the morning of the accident plaintiff crossed the plank and walked three or four feet to a hole in the bulkhead through which he crawled to reach his place of work. At this time the tank area was adequately illuminated. Plaintiff completed his work about 11:00 a. m. and proceed to return to the deck. He crawled

through the hole in the bulkhead, took a step forward, and fell about nine feet to the floor of the open tank. Both he and a co-worker testified that the area was then dark except for the slight illumination which emanated from a small hatch about twenty feet above and on the other side of the tank. They also testified that the plank was not then in place. Another employee testified that several minutes prior to the accident he had crossed the plank, which was then well lighted. He further stated that several minutes after the accident the plank was in the same position and the lights were lit.

"The issues were submitted to the jury for a special verdict on interrogatories. The jury found that the injuries were caused by an unsafe condition, but that defendant was not negligent in failing initially to assure plaintiff a safe place to work and that defendant did not control the area at the time of the accident."

Petitioner also agrees with the facts stated by the Court of Appeals (Petition, p. 5) but suggests that other alleged "controlling and undisputed facts" should be added. We do not agree that the alleged additional facts are controlling, and they are not all undisputed. The first fact suggested by petitioner as "controlling" is with respect to the extent of repairs to the ship involved. Seaworthiness is not involved in the action, and the extent of repairs has no bearing on the sole issue of the case, i.e., negligence of the shipowner.

The next fact claimed by petitioner to be "controlling" is that the repair work was performed "behind a bulkhead" and "beyond the open tank that caused the accident" (Petition, p. 5). Such a claim ignores the fact that the whole area was *one tank* in parts of which there was decking twenty feet down from the top (a sort of 'tween deck), and that the area "behind a bulkhead" was merely

one of the wings of the tank at that level. The bulkhead referred to was a "swash bulkhead", the purpose of which was to retard sudden shifting of a molasses cargo when rolling in seas (53a-54a).

What petitioner referred to as the "open tank" is merely a part of the tank which does not have any decking at that level. The bottom of the tank is around nine feet below the decking referred to (14a), but the ladder by which one enters the tank extends from the top (at the main deck), through the opening referred to, to the bottom of the tank (72a).

At page 6 of the petition other matters are stated as "verities", but they are mostly arguments. One alleged "verity" is that the open area "was at all times unlighted." That cannot be called undisputed, because it is a misstatement, contrary to the evidence. The plaintiff himself, as well as his only witness, testified that the area was lighted at the time they went into the tank (10a, 11a, 12a, 55a, 8a, 9a). The testimony of the repairmen was that it was lighted, at least up to a few minutes before the accident (67a, 72a, 73a, 74a). There is no evidence that it was not lighted at all times except possibly when the plaintiff and his helper proceeded to leave the tank.

Petitioner repeatedly refers (Petition, pp. 22, 28, 29) to the trial judge's explanation to the jury, that plaintiff claimed that no safe means had been provided for crossing the opening into which he fell (21a), as a charge of what the actual facts were. It is proper for a judge to point out *the claims* of the parties, but it is for the jury to decide *the facts*, and that was what was done in this case. The court did not tell the jury what facts to find.

ARGUMENT

POINT I

The judgment below conforms to the rules cited by petitioner and is not contrary to, nor inconsistent with, those rules.

Petitioner's argument seems to be that respondents "created the law of the case" by not excepting to the trial court's instructions to the jury. At page 11 of the petition it is stated "they themselves 'created' the law as to the issue of control;" and this argument is repeated at pages 16 and 4. At page 17 it is stated that respondents "established and made mandatory" such law. Perhaps we should be flattered, but in all modesty we are compelled to concede that we do not have such power.

In any event the jury returned a verdict that the shipowner was not in control of the area involved and was not negligent. It is the jury's verdict that is under attack by petitioner; and that verdict being based on the evidence and "the law of the case," there is nothing to review.

Petitioner's unsound argument is claimed to be based on Rule 51 of the Federal Rules of Civil Procedure which provides that a party may not "assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires." Petitioner's argument ignores the fact that respondents are not assigning any error to the court's instruction, which as the Court of Appeals said "was unduly favorable to the plaintiff." It was on that favorable charge that the jury found for the defendant.

There is nothing in Rule 51 which empowers counsel to usurp the powers of the legislature and the courts. It merely provides that one who does not except to a charge, cannot attack that charge later. Respondents are not

attacking the charge of the court; it is the petitioner who is attacking the findings of the jury based on the court's charge. As the Court of Appeals said of this argument, "its mere statement (is) a sufficient demonstration of its fallacy."

It is interesting to note that although plaintiff objects to the findings of the jury, she concedes that "the jury had the absolute right" to determine the issue in her favor. Of course it had such right, but it did not so find. We do not agree that although the jury had the right to find for the plaintiff, it did not have the right to find for the defendant on the evidence.

Petitioner not only undertakes to benevolently bestow power on respondents to create law, but also takes unto herself power to amend the jury's verdict (Petition, pp. 37-38-39). The petition points out that by amending the verdict, petitioner is entitled to judgment. This purports to be based on Rule 58, which provides that "the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by the jury pursuant to Rule 49." That was done in this case, but petitioner argues that with *her amendments* of the verdict she should be awarded a judgment.

Petitioner also argues that the judgment below does not comply with Rule 49 which provides that when answers are consistent with each other but one or more is inconsistent with a general verdict, the court may direct the entry of judgment in accordance with the answers. That has no application whatever to the case now before this Court, as there was no general verdict. This case was submitted to the jury for a special verdict under section (a) and not for a general verdict in addition to interrogatories under section (b).

POINT II

The judgment below is in conformity with the decisions of this Court and the lower courts, and there is no inconsistency.

It would seem unnecessary, but we will refer to a few of the cases in point which are consistent with, and uphold, the judgment and the jury verdict which petitioner seeks to attack.

In *West* v. *United States,* 361 U. S. 118, 121-4, 80 S. Ct. 189, 191-3, this Court affirmed a denial of recovery in a repairman's suit claiming both negligence and unseaworthiness. As the present petition does not involve any question of seaworthiness, we will quote only from this Court's opinion on the claim of negligence:

> "• • • In addition, petitioner claimed that the United States was liable for negligence in not maintaining a safe place for him to work, a duty asserted to be non-delegable and absolute.
>
> "• • • Furthermore, he (libelant) took his orders from the contractor, not the shipowner. He knew who was in control. • • •
>
> "In presenting his alternative ground of recovery, the petitioner has a dual theory. He first says that the duty to furnish a safe place to work is a non-delegable duty, the violation of which does not depend on fault. If unsuccessful in this position, he insists that respondent's failure to keep the water plug tight was negligence.
>
> "• • • Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work. But we do not believe that such a duty was owed under the circumstances of this case. Petitioner

> overlooks that *here the respondent had no control over the vessel or power either to supervise or to control the repair work* on which petitioner was engaged. *We believe this decisive against both aspects of plaintiff's dual theory.* * * * It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. The Courts of Appeals seem to have followed this rule. See Filipek v. Moore-McCormack Lines, 2 Cir., 258 F. 2d 734. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers. * * * *Any culpability here could be chargeable only to the contractor, not to the shipowner.* * * *But here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner.*" (Italics supplied)

The situation in the case now before this Court is very similar to that in the *West* case, insofar as any claim of negligence of the shipowner is concerned. As in *West*, this petitioner claims that the shipowner was liable for negligence in not maintaining a safe place for him to work and that such a duty was non-delegable and absolute. But as pointed out by this Court such liability would not attach because the shipowner had no "power either to supervise or control the repair work on which petitioner was engaged."

In *Filipek* v. *Moore-McCormack Lines,* 258 F. 2d 734, 737, referred to by this Court in the *West* opinion, and in which this Court had denied certiorari (359 U. S. 927, 79 S. Ct. 605), the Court of Appeals for the Second Circuit said:

> "It is likewise clear that the plaintiff's charge that the defendant was negligent in failing to see that work was done safely is without merit. While certain of the ship's officers were present during the testing of the equipment, it is apparent that they were there not to direct the work or to participate in it in any way, but merely as observers. The work of Filipek, and the other Eastern employees was actually supervised by Eastern's foremen. No orders were in fact given by any of the ship's officers. The mere presence of some of the ship's officers placed no duty on Moore-McCormack to see that the work was being done in a safe manner by Eastern's employees."

In the case now before this Court, unlike in the *Filipek* case, there was no one in the molasses tank except the shipyard employees (59a, 71a).

In *United N. Y. & N. J. Sandy Hook Pilots' Ass'n.* v. *Halecki,* 358 U. S. 613, 618-19, 79 S. Ct. 517, 520, a ship was undergoing annual overhaul, one of the items of work being the dismantling and overhauling of the ship's generators, which required that they be sprayed with a toxic compound. The shipyard had sub-contracted the electrical work to the employer of plaintiff's decedent. The decedent died as a result of inhaling some of the toxic compound which he was using, and the action was brought on the ground of unseaworthiness and negligence. This Court said with respect to the negligence claim:

> "As to the claim based upon negligence, * * * we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a ver-

> dict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. *It was for the triers of fact to determine whether the defendants were responsibly negligent* in permitting or authorizing the method or manner of its use." (Italics supplied)

In the case now before this Court the issue of the shipowner's negligence was left to "the triers of the fact," and they determined that the shipowner was not negligent. Petitioner seems to argue that the question of control should not have been left to the jury, and its finding of no negligence on the part of the shipowner should be set aside. In *Halecki,* however, this Court said that the evidence at the trial "created an issue that could be decided" *only* by a verdict.

In *Gallagher* v. *United States Lines Co.* (C. A. 2), 206 F. 2d 177, 179, cert. den. 346 U. S. 897, 74 S. Ct. 221, rehearing den., 346 U. S. 940, 74 S. Ct. 375, the plaintiff's intestate was a longshoreman assisting in discharging cargo from the defendant's vessel. He was struck by a bale of cargo which fell from an aeroplane skid which belonged to his employer. The Court of Appeals reversed a judgment for the plaintiff and directed judgment in favor of the defendant shipowner, in the course of its opinion saying:

> "Thus, a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work. • • • Viewed in perhaps another way, United [shipowner] owed a duty to [plaintiff], a business visitor, but *this duty would not*

extend to conditions and activities over which United had no control." (Italics supplied)

As pointed out above, certiorari was denied in that case, but petitioner asks this Court to grant certiorari and review the decisions of the lower courts in this case on the alleged ground that the shipowner's duty extended to activities in the molasses tank which had been turned over to the shipyard workers and over which the shipowner had no control, a fact found by the jury.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre* (C. A. 2), 213 F. 2d 397, there were employees of the shipowner present at the place of the accident (unlike in the case at bar) but the court found that those employees were not concerned in the manner in which the work was being done by plaintiff and his fellow longshoremen, saying:

> "We are clear that since details of the operation was left to American [the stevedore], Cyprien [shipowner] cannot be held for negligence in the latter's performance.
>
> * * * *
>
> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (p. 400)

In *Long* v. *Silver Line* (C. A. 2), 48 F. 2d 15, 16, a shipyard worker sued to recover for personal injuries sustained on a ship. As in the case at bar, there were no lighting fixtures in the work area, and two days before the accident the shipyard installed portable lights for use there. In affirming a dismissal as against the shipowner, the Court of Appeals said:

> "The fault of the ship, if any, was in failing to supply a light in the between-decks. * * * The ship had no

> control over the order of the work. * * * Although the [repairer's] contract said nothing as to who was to supply the lighting, it had *voluntarily undertaken to do so. No one asked, or expected, the ship to furnish the lights.* * * * Under the circumstances the utmost duty that the [shipowner] could have owed [libelant] was to warn him that it would be dangerous to walk about the between-decks in the dark. * * * Although work had not begun upon tank No. 4, we think the District Court correctly found that all four tanks and the between-decks of hatch No. 3 *were under the control of [the repairer], and correctly held that the [shipowner] was free from negligence.*" (Italics supplied)

Among other cases holding that a shipowner having no control over the work being done is not liable for failure to furnish a safe place, are *Lopez* v. *American Hawaiian Steamship Co.* (C. A. 3), 201 F. 2d 418, 420; *Pedersen* v. *The Bulklube* (E. D. N. Y.), 170 F. Supp. 462, 465-6; *Latus* v. *United States* (E. D. N. Y.), 170 F. Supp. 837, 841; *Lyon* v. *United States* (E. D. N. Y.), 163 F. Supp. 206, 208, aff'd. 265 F. 2d 219. In the latter case the Court of Appeals for the Second Circuit said:

> "In the absence of power to supervise or control the work, the shipowner cannot be held negligent."

The shipowner is not an insurer. *Phipps* v. *N. V. Nederlandsche Amerikaansche, S. M.* (C. A. 9), 259 F. 2d 143, 145; *Barbazon* v. *Bellships Co.* (C. A. 3), 202 F. 2d 904, 906; *Freitas* v. *Pacific-Atlantic Steamship Co.* (C. A. 9), 218 F. 2d 562, 564.

In *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 632, 79 S. Ct. 406, 410, this Court said that the duty of the owner of a ship in navigable waters to those legitimately on board is one of *exercising reasonable care under the circumstances of each case.* Control is neces-

sarily an important element or circumstance in the issue of "reasonable care." It would be unreasonable to find culpability in one who has no power of control. The jury in this case found that the shipowner did not have control of the area where, and at the time, the decedent walked into the opening which was known to him (55a), and that it was not negligent. The jury found such facts from the evidence before it, and it is not the province of an appellate court to change such jury findings if there is any evidence supporting them.

CONCLUSION

The judgment below was properly based on a jury verdict and the petition for certiorari should be denied.

Respectfully submitted,

FRANK A. BULL,
JOHN P. CARSON,
Counsel for Respondents.